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# FEDERAL MARITIME COMMISSION

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| CANAVERAL PORT AUTHORITY - POSSIBLE VIOLATIONS OF SECTION 10(B)(10), UNREASONABLE REFUSAL TO DEAL OR NEGOTIATE<br><br>EXCLUSIVE TUG ARRANGEMENTS IN PORT CANAVERAL, FLORIDA | Docket Nos. 02-02 and 02-03 |

Served: July 8, 2003

**BY THE COMMISSION:** Steven R. BLUST, *Chairman;* Joseph BRENNAN, Harold J. CREEL, Jr., Rebecca F. DYE, and Delmond J.H. WON, *Commissioners.*

## ORDER GRANTING JOINT PETITION TO APPROVE SETTLEMENT AND DISCONTINUE PROCEEDINGS AND MODIFYING THE FINDINGS OF JURISDICTION

The parties in the above-captioned proceedings, the Commission's Bureau of Enforcement ("BOE"), respondent Canaveral Port Authority ("CPA"), and intervenors Seabulk International, Inc. and Petchem, Inc. ("the parties"),[1] submitted

[1]Intervenor Tugz International, LLC did not sign the proposed (continued...)

a Joint Petition to Approve Settlement and Discontinue Proceedings ("Petition") in Docket No. 02-02 - Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate, and Docket No. 02-03 - Exclusive Tug Arrangements in Port Canaveral, Florida.*

In Docket No. 02-02, the Comrnission issued an Order finding that CPA violated section 1 O(b)( 10) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1709(b)(10), beginning on July 19, 2000, and continuing until May 20, 2002, by refusing to consider the application for a tug and towing franchise submitted by Tugz International, LLC, on June 13, 2000, and updated on September 18, 2001. The Commission further found that there was insufficient information to make a determination of civil penalties and ordered the parties to

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(...continued)
Settlement Agreement, but rather submitted a "statement" on the issue of settlement. Tugz states that it requested that the proposed settlement not be construed as a settlement of, release of or bar to private civil claims Tugz intends to pursue against CPA. CPA refused to add any such language to the proposed Settlement Agreement, and thus Tugz refused to sign it. Tugz maintains that otherwise it approves of the proposed Settlement Agreement. Tugz asserts that if the settlement proceeds over its objections, "Tugz serves notice that any such settlement is not intended, and shall not be considered, as a settlement and/or release of, or bar to, any claims which will be brought by Tugz International LLC and/or its affiliates against the CPA and others in other fora, all such claims and rights being expressly saved and reserved." Statement of Intervenor Tugz International L.L.C. on Issue of Settlement at 3.

[2] As the parties have filed a joint petition in these proceedings, we are consolidating our ruling into a single order.

submit additional briefs on the issue. In Docket No. 02-03, Administrative Law Judge Michael A. Rosas ("ALJ") issued an Initial Decision finding that CPA violated section 10(d)( 1) of the Shipping Act, 46 U.S.C. app. § 1709(d)(l), by failing to establish, observe and enforce just and reasonable regulations and practices relating to the tug franchise system at Port Canaveral, and section 10(d)(4) of the Shipping Act, 46 U.S.C. app. § 1709(d)(4), by giving an undue or unreasonable preference or advantage to Seabulk, the sole franchisee for tug services at the port, and imposing undue or unreasonable prejudice or disadvantage with respect to other potential tug providers, including Petchem and Tugz. The ALJ assessed a civil penalty of $214,500 against CPA, and ordered CPA to cease and desist from operating a tug franchise system.

As all settlements must be approved by the "presiding officer," which in both cases is the Commission, the proposed Settlement Agreement is before the Commission for review. See 46 C.F.R. § 502.603(a). The Commission grants the parties' petition and approves the proposed Settlement Agreement in full. The Commission also modifies its Order in Docket No. 02-02 and the Initial Decision in Docket No. 02-03 to more accurately reflect the extent of its jurisdiction in both cases.

## THE PROPOSED SETTLEMENT AGREEMENT

The proposed Settlement Agreement provides that (1) CPA shall pay a civil penalty in the amount of $750,000 no later than 30 days following approval by the Commission; (2) CPA shall eliminate the tug franchise system and shall permit vessels calling at the port to select the tug company of their choice, provided that the tug company has obtained and maintains a

towing permit from CPA based upon evidence of certain insurance and payment of permit fees; and (3) both proceedings shall be discontinued and any future claims by the Commission based on the violations found in Docket Nos. 02-02 and 02-03 will be barred. Petition at 2, 8; Settlement Agreement at 2-3.

The parties urge the Commission to approve the proposed Settlement Agreement. The parties note that they do not seek to vacate the orders in either Docket No. 02-02 or Docket No. 02-03, except to the extent that the decisions may be inconsistent with the proposed Settlement Agreement, e.g., the amount of the civil penalty in Docket No. 02-03 would be replaced by the proposed assessment, and the requirement to file briefs on penalties in Docket No. 02-02 would be superseded.

A. Criteria for Commission review

The parties assert that the Commission should evaluate a proposed settlement by the factors set forth in Rule 603(b) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.603(b),[3] and Commission case law incorporating previous Commission rules governing settlements. . Petition at 5. The parties state that this method was explained in Armada Great

[3]That section provides:

> In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and further compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

Lakes/East Africa Service, Ltd.: Great Lakes Transcaribbean Line, 23 S.R.R. 946,956 (I.D.), administratively final April 25, 1986, where the Commission recognized that while the Shipping Act and the Commission's implementing rules address the criteria for assessment of penalties, but not the criteria for settlement, the history of the settlement process at the Commission clarifies that the criteria for settlements were intended to be encompassed in the regulations governing penalty assessments. Petition at 5-6.

Prior to the passage of the 1984 Act, the Commission had implemented rules governing the compromise, assessment, settlement and collection of civil penalties. 46 C.F.R. Part 505 (1979). The rules provided that the criteria for approving settlements could include, but need not be limited to, the government-wide Federal Claims Collection Standards jointly established by the Comptroller General and the Attorney General of the United States under 4 C.F.R. Parts 101-l 05. Armada, 23 S.R.R. at 956. The Commission incorporated the relevant standards into its criteria for evaluating both settlement agreements and assessments of civil penalties. Id. Based on these standards, the Commission began to evaluate such agreements by "balancing enforcement policy of deterrence by respondent, the industry and the general public with the litigative probabilities, litigative and administrative costs and such other matters as justice may require." Petition at 6 (citing Roval Caribbean Cruises Ltd. - Possible Violations of Certification Requirements, 26 S.R.R. 64 (199 1); Investigation of Unfiled Agreements - Yangming Marine Transport, Evergreen Marine Cornoration and Orient Overseas Container Line, Inc., 24 S.R.R. 910 (1988); Armada, 23 S.R.R. 946; Far Eastern Shipping Co. - Possible Violations of Section 16, Second Paragraph, 18(b)(3) and 18(c), Shipping Act. 1916, 21

S.R.R. 743 (I.D.), administratively final May 7, 1982; Eastern Forwarding International, Inc. - Independent Ocean Freight Forwarding Application - Possible Violations, Section 44, Shipping; Act. 1916, 20 S.R.R. 283 (I.D.), administratively final September 8, 1980).

After passage of the 1984 Act, the Commission's rules no longer referred to the Comptroller General and Attorney General regulations as the basis for evaluating settlement agreements. Rather, the regulations set forth generally the same criteria, under what is now Rule 603(b), as is provided in section 13(c) of the Shipping Act for the assessment of civil penalties.[4] The Commission has determined, however, that analyzing settlements pursuant to the Comptroller General and Attorney General standards is still appropriate pursuant to the language in Rule 603(b) requiring consideration of "such other matters as justice may require." Armada, 23 S.R.R. at 956. Accordingly, the Commission has generally analyzed settlement agreements based on both the criteria culled from the Comptroller General and Attorney General standards as provided in Commission case law and the criteria for analyzing the amount of the penalty assessed in Rule 603(b), i.e., (1) the Commission's enforcement policy in terms of deterrence and securing compliance; (2) administrative and litigative costs; (3) the litigative probabilities of proving the case for the full

[4] Section 13(c), 46U.S.C. app. § 1712(c), provides in part that: In determining the amount of the [civil] penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.

amount claimed; and (4) pursuant to Rule 603(b), "the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and further compliance with the Commission's rules and regulations and the applicable statutes,"[5] and "the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires." 46 C.F.R. § 502.603(b).

B. The parties' arguments in support of approving the proposed Settlement Agreement

The parties aver that although this is an unusual case for settlement as the merits of both cases have been decided, by the Commission in Docket No. 02-02 and by the ALJ in Docket No. 02-03, the criteria for evaluating settlements are still met. Petition at 7.

The parties contend that the proposed settlement, in conjunction with the findings in the two decisions, will encourage compliance and act as a deterrent against future violations. Id. In addition, the parties assert, termination of the tug franchise system would allow competition for tug services and freedom of choice of tug operators in Port Canaveral. The parties contend that the tug permit system proposed in the settlement would be "minimallyrestrictive, objective, and open to all applicants." Id. at 7-8. Permits would be issued based on evidence of liability and other statutorily required insurance, and payment of initial and annual permit fees. Id. at 2. The parties aver that this solution adequately addresses the

[5] This overlaps with the requirements set forth in Commission case law.

Commission's concerns with the exclusivity of the franchise system. Id. at 7-8.

The parties note that Docket No. 02-02 still requires further briefs on civil penalties and there is a possibility that one or more parties would appeal the Commission's decision to the U.S. Court of Appeals. In addition, the parties aver that in Docket No. 02-03 there is also the likelihood of appeal to the Commission and beyond. Thus, approving the proposed Settlement Agreement, the parties argue, would end litigation and its associated costs. Id,

Finally, with respect to ability to pay, the parties maintain that "CPA has achieved more than $30 million in revenues during each of the past three fiscal years and sufficient excess cash reserves so that, absent unforeseen circumstances, the amount of the Settlement can be paid without unduly affecting port finances or operations, and without imposing an additional burden on port users." Id. at 7.

C. Discussion

We approve the proposed Settlement Agreement. The proposed settlement will encourage compliance and deter others from future violations. The Commission's and ALJ's findings of violations of sections 1 O(b)( 10), 1 O(d)(l), and 1 O(d)(4), the dismantling of the tug franchise system, and the assessment of civil penalties, send a strong message to other ports and marine terminal operators that such anti-competitive behavior is prohibited by the Shipping Act.

Furthermore, the permit system endorsed in the proposed Settlement Agreement seeks to provide a fair and objective

basis upon which to allow CPA to maintain control over the tug companies that are providing services in its port, while not being unduly restrictive to the point of anti-competitiveness. The parties note that the ALJ's decision in Docket No. 02-03 would only have to be modified slightly to effectuate this proposal: "the broad prohibition against CPA's restrictions on a vessel's choice of tug operators contained in the last sentence of [the] Initial Decision would be modified to provide for the permit system." Petition at 2-3.

All of the parties will also benefit by not having to bear the costs associated with further litigation in both cases. It is unclear what the litigative probabilities are of proving the case for the full amount of the potential civil penalties. The range of possible penalty amounts is very broad, and settlement removes the uncertainty regarding the amount of civil penalties to be assessed, as well as the costs and uncertainties of further litigation.

The amount of the civil penalty in the proposed Settlement Agreement meets the Commission's criteria for approving settlements. The maximum amount that could be assessed against CPA is $4,007,500 in Docket No. 02-02 and $5,285,500 in Docket No. 02-03. The parties now propose that CPA be assessed a total penalty in the amount of $750,000. CPA has been found culpable and the extent and gravity of its violations are quite serious; however, this is the first time CPA has been found to have violated the Shipping Act. Moreover, in analyzing CPA's ability to pay, the parties - including CPA itself - indicate that CPA has sufficient funds to pay the proposed penalty amount, and they assure the Commission that such payment will not unduly affect port finances or operations

and will not impose an additional burden on port users. The proposed assessment of $750,000 is justified.

Therefore, we approve the proposed Settlement Agreement in full.[6]

## JURISDICTION

Upon further consideration of the Commission's Order in Docket No. 02-02 and the ALJ's Initial Decision in Docket No. 02-03, we have realized that, while the findings of jurisdiction over CPA are correct, the analyses are unnecessarily restrictive. In order to avoid any future precedential effects of such determinations, we are issuing a modification, pursuant to section 14(b) of the Shipping Act, 46 U.S.C. app. § 1713(b), to

[6]The Department of the Navy, Military Sealift Command ("MSC") submitted a Petition for Leave to Intervene in Docket No. 02-03 to file limited exceptions to certain findings of fact and conclusions in the Initial Decision regarding Navy contracting practices for tug services at Port Canaveral. MSC objects to findings of fact and conclusions in the Initial Decision which indicate that CPA convinced the Navy not to renew Petchem's contract to provide military tug services at Port Canaveral. MSC Petition at 2 (citing Exclusive Tug Arrangements in Port Canaveral. Florida, Slip Op. at 2, 24 n.13, 66, and 71). MSC takes the position that the findings do not accurately represent the facts surrounding the expiration of the Petchem contract and may, therefore, affect the integrity of its contracting practices. Id. at 3-4. However, MSC concedes that it does not object to the ultimate findings of violations against CPA. Id. at 4. In light of the parties' determination to settle these proceedings and the fact that MSC's concern is not central to the finding of violations and assessment of civil penalties in Docket No. 02-03, we find that MSC's petition is moot.

clarify that the Commission has jurisdiction over CPA pursuant to section 3(14) of the Shipping Act, 46 U.S.C. app. §1702(14).

In Docket No. 02-02, the Commission found that it has jurisdiction over CPA because CPA had usurped the right of carriers to choose their tug operator and made access to the terminal facilities dependent on one predetermined tug operator, thus transforming the furnishing of tug services into a terminal service. Canaveral Port Auth.- Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate, Slip Op. at 27-32. The Commission set forth the inquiry as follows:

> The Shipping Act grants jurisdiction to the Commission over marine terminal operators, defined, in part, as "person[s] engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. app. § 1702(14). CPA meets the definition of marine terminal operator and, thus, the Commission has personal jurisdiction over it. FF 1, 2, 5. Whether the Commission has subject matter jurisdiction over CPA in this proceeding depends upon whether the restrictions on tug services in the port are "relat[ed] to or connected with receiving, handling, storing. or delivering property" as defined by section 10(d)(1) of the Shipping; Act, 46 U.S.C. app. §1709(d)( 1).

Id. at 27 (footnote omitted) (emphasis added). However, the second part of the analysis is not necessary. Whether the furnishing of tug services is related to the "receiving, handling, storing or delivering of property" is only relevant when a

section 1 O(d)( 1) violation is alleged. The issue in Docket No. 02-02 was whether CPA refused to deal or negotiate pursuant to section 1 O(b)( 10). Accordingly, whether CPA's operation of the tug franchise system constituted the furnishing of terminal facilities is the only relevant question. To require that the services in question relate to the "receiving, handling, storing or delivering of property" would in effect apply the additional jurisdictional boundaries of section 10(d)( 1) to cases brought under section 1 O(b)( 10), an outcome that would be unduly restrictive.

In any event, the Commission correctly found that it has jurisdiction over CPA. Indeed, CPA had conceded that it is a marine terminal operator; it had also argued that its operation of the tug franchise system did not constitute the furnishing of terminal facilities subject to Comrnission jurisdiction.

In Plaouemines Port. Harbor and Terminal District v. Federal Maritime Commission, 838 F.2d 536 (D.C. Cir. 1988), the D.C. Circuit explained that an exercise of control over essential services, coupled with control over access, rises to the level of furnishing terminal facilities. In that case, a port that did not own or operate wharves, docks or other terminal facilities included in its tariff a "Harbor Fee" and a "Supplemental Harbor Fee" to be assessed on commercial vessels for fire and emergency services, and was able to deny access to the port facilities to those who failed to pay the fees. 838 F.2d at 540-41. The D.C. Circuit explained that the question of jurisdiction would be governed by the definition of marine terminal operator in the Shipping Act: "[i]f the Port engages in 'furnishing . . . other terminal facilities,' it is a 'marine terminal operator' and falls under the 1984 Act and the FMC's jurisdiction." Id. at 542. The court then held that the

port's "combination of offering essential services and controlling access to the private facilities amounts to the furnishing of terminal facilities" under the Shipping Act. Id. at 543. See also Puerto Rico Ports Auth. v. Federal Maritime Comm'n, 9 19 F.2d 799, 803 ( 1st Cir. 1990) ("To support the exercise of Commission jurisdiction, it must be determined initially that the one providing the service is a marine terminal operator - in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.").

As the Commission explained in Docket No. 02-02,

> CPA restricts access to the port through its franchise system; vessels may access the port only by using Seabulk's tug services. By controlling who may offer tug services and by granting that right to only one tug company, CPA has made access to the terminals and terminal facilities dependent on a commitment to Seabulk, and thus has limited the prerogative of carriers to choose a tug operator.

Slip Op. at 29 (footnote omitted). CPA offers an essential service, tug and towing, and controls access to the terminal facilities based on the use of a predetermined tug operator. See Id. Consistent with the D.C. Circuit's conclusions in Plaquemines, this control of access amounts to the furnishing of terminal facilities within the Shipping Act's definition of marine terminal operator.

The Commission's assertion of jurisdiction is therefore correct, and the appropriate reasoning already appears in the

Commission's Order. We nevertheless modify the Order in Docket No. 02-02 and the ALJ's Initial Decision in Docket No. 02-03 to the extent that those decisions appear to impose the additional jurisdictional limits found in section 1 O(d)(l), and hold that the Commission has jurisdiction over CPA pursuant to section 3( 14) of the Shipping Act.[7]

## CONCLUSION

THEREFORE, IT IS ORDERED, That the Joint Petition to Approve Settlement and Discontinue Proceedings submitted by the Commission's Bureau of Enforcement, Canaveral Port Authority, Seabulk International, Inc., and Petchem, Inc., is granted and the Settlement Agreement is incorporated as attached; and

IT IS FURTHER ORDERED, That the Department of the Navy, Military Sealift Command's Petition for Leave to Intervene to File Limited Exceptions is denied as moot; and

IT IS FURTHER ORDERED, That the Commission's Order in Docket No. 02-02 - Canaveral Port Authority - Possible Violations of Section 1 0(b)(10), Unreasonable Refusal to Deal or Negotiate, and the ALJ's Initial Decision in Docket

[7]The ALJ's jurisdictional analysis in Docket No. 02-03, to the extent it analyzed CPA's violations of section 10(d)(l), is left unchanged.

No. 02-03 - Exclusive Tug; Arrangements in Port Canaveral, Florida, are modified with respect to the findings ofjurisdiction.

By the Commission.

Bryant L. VanBrakle
Secretary